Wabeek Country Club *and* Hotel Employees and Restaurant Employees International Union, Local 24, AFL–CIO and Detroit Club Managers Association. Cases 7–CA–29200–1 and 7–CA–29200–2

February 12, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On March 20, 1990, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Wabeek Country Club, Bloomfield, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

''(c) Enforcing or applying a rule prohibiting its employees from making or publishing false statements that are related to or part of protected concerted or union activities.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for filing charges with the National Labor Relations Board or for engaging in protected concerted activities on behalf of the Hotel Employees and Restaurant Employees International Union, Local 24, AFL–CIO, or any other union.

WE WILL NOT enforce or apply a rule prohibiting our employees from making or publishing false statements that are related to or part of protected concerted or union activities.

WE WILL NOT refuse to bargain with the Union as the exclusive bargaining representative of employees in an appropriate unit, by failing to furnish it with requested information that is relevant to administering its collective-bargaining agreement with us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Susan Olson immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and WE WILL make her whole for any loss of earnings and other benefits resulting from her removal from the steady extra schedule, less any net interim earnings, plus interest.

WE WILL notify Susan Olson that we have removed from our files any reference to her removal from the work schedule and inform her that this removal will not be used against her in any way.

WE WILL furnish to the Union, in a timely manner, the information requested in its letter of February 1, 1989, which is needed to properly administer the collective-bargaining agreement.

WABEEK COUNTRY CLUB

Tina Pappas, Esq., for the General Counsel.
Karl Bennett Jr., Esq. (Stringari, Fritz, Kretger, Ahearn, Bennett & Hunsinger), for the Respondent.
Russell Linden, Esq. (Miller Cohen, Martens & Ice), for the Charging Party.

[1] In agreeing with the judge that deferral to arbitration is inappropriate, we find it unnecessary to rely on her finding that the arbitration award is repugnant to the Act and her discussion in connection with that finding.

We further note, in adopting the judge's finding that the Respondent's failure to provide information was unlawful, that the purpose of the Union's payroll audit was to investigate possible violations of the parties' contractual checkoff and union-security provisions, while the subsequent union information request focused on different information, i.e., names and hire dates of employees, dates and hours worked, and their employment status, in order to assess the Respondent's compliance with other contract provisions relating to hours of work, wage rates, transportation, seniority, and other working conditions insofar as such provisions distinguish among different types of employees.

There were no exceptions to the judge's failure to resolve the complaint allegation that the Respondent violated Sec. 8(a)(1) by maintaining work rule 14.

[2] We shall modify par. 1(c) of the judge's recommended Order so as to require the Respondent to cease and desist from enforcing or applying a rule prohibiting its employees from making or publishing false statements that are related to or part of protected concerted activity—regardless of when or where such statements are made or published.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. On charges filed April 25, 1989, as amended on May 5, a consolidated complaint issued on June 7, 1989, alleging that the Respondent, Wabeek Country Club, violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act). The Respondent answered on June 7, 1989, denying that it had committed any unfair labor practices.

The case was tried before me in Detroit, Michigan, on September 13 and 14 and October 16, at which times the parties had full opportunity to examine witneses, introduce documentary proof, and argue orally. Taking the witnesses' demeanor into account, and on the entire record, including posttrial briefs submitted by the parties, pursuant to Section 10(c) of the Act, I make the following

FINDINGS OF FACT

I. THE ISSUES

Based on the pleadings and the entire record in this case, the following issues are presented in the order in which they are resolved[1]

(1) Whether deference is owed to an arbitral award finding that Respondent effectively discharged Olson for just cause.

(2) Whether Respondent violated Section 8(a)(1), (3), and (4) by refusing to schedule employee Susan Olson for waitressing work because she allegedly violated a workrule prohibiting employees from ''making or publishing false, vicious, or malicious statements'' about other employees or supervisors, served as a vigorous union steward, complained to the Union about various employment practices and filed a charge with the Board.

(3) Whether Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining the above-quoted workrule.

(4) Whether Respondent violated Section 8(a)(1) and (5) by failing to furnish the Charging Party with requested information.

II. JURISDICTIONAL FINDINGS

Respondent, a Michigan corporation, with its only office and place of business in Bloomfield, Michigan, is a private golf and country club engaged in the business of providing recreational facilities and the retail sale of meals to members and guests.

At all material times, Respondent has been, and is now, an employer-member of the Detroit Club Managers Association, an organization composed of employers engaged in operating private recreational clubs, which exists for the purpose, inter alia, of representing its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Charging Party, Hotel Employees and Restaurant Employees, Local 24.

During the calendar year ending December 21, 1988, a representative period, Respondent, in the course and conduct of its operations, derived gross revenues in excess of $500,000, not including dues and initiation fees. During the same period, Respondent purchased and caused to be transported to its facility alcohol and related products valued in excess of $50,000 from the Michigan Liquor Control Commission, which received these products directly from points outside the State.

Based on these facts, the Respondent admits, and I find, that Wabeek Country Club is now and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Charging Party, Local 24 (the Union) is now and has been at all material times a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The 8(a)(3) and (4) Allegations*

1. Background: Olson's first discharge

As a member of the Detroit Club Managers Association, Wabeek Country Club was party to a collective-bargaining agreement with Local 24, which represents a unit of Respondent's employees including, among others, servers, bartenders, and kitchen employees.

Susan Olson, the alleged discriminatee, first worked as a server at the Wabeek Country Club from April 1986 to April 22, 1988, when Respondent removed her name from its list of ''steady extra'' employees, an action tantamount to discharge.[2] The circumstances leading to her dismissal and eventual reinstatement are as follows.

In July 1987, Olson was elected shop steward. In that position, she became a staunch advocate of employee rights, filing a number of grievances to protest Respondent's alleged breaches of the collective-bargaining agreement. For example, under her stewardship, grievances were lodged protesting shortages in overtime payments, the inequitable distribution of gratuities, the refusal to promote steady extra employees to steady positions, employment of minors, and the manner in which discipline was imposed on employees.

Olson was discharged in April 1988 and promptly filed a grievance attributing Respondent's action to her activities as a steward. A month later, she filed a charge with the Board alleging that she had been terminated for discriminatory reasons.

Subsequently, in a conversation with union business representatives, Carol Bronson and Jack Mohr, Respondent's attorney, Karl Bennett, asked why Olson had lodged the NLRB charge, chided them for failing to advise her against doing so, and requested that they persuade Olson to withdraw it.

During the same time period, Respondent's general manager, Wayne Russell, acknowledged to Bronson that Olson had been an outstaning server and employee, but that ''all the problems had started'' after she became shop steward.

In late September 1988, Bennett again asked Mohr to persuade Olson to withdraw her NLRB charge. He added that

[1] Exhibits offered into evidence by counsel for the General Counsel will be referred to as G.C. Exh. followed by the exhibit number; Respondent's exhibits will be cited as R. Exh. __.

[2] ''Steady-extra'' is a term of art defined in the parties' collective-bargaining agreement as ''an extra employee whose name appears on a written list maintained by the Club, and who is called to work directly by the Club. . . . There shall be no set schedules for steady-extra employees, but the club will endeavor to notify them of the schedule prior to the beginning of the work week.'' (G.C. Exh. 3 at 7–8.)

Olson was a ''pain in the ass'' and that her outspokenness always was getting her into trouble with management.

On October 13, Olson entered into a settlement with Respondent in which she agreed, inter alia, that in return for reinstatement as a steady extra, she would forfeit backpay, resign as shop steward, and withdraw her unfair labor practice charge.

2. The present case: Olson's second discharge

On returning to work on October 28, Olson's coworkers again began sharing their concerns about working conditions with her. They discussed a variety of matters including the terms of her settlement, a pending grievance as to overtime pay, and tips. Respondent's alleged failure to abide by the contract with respect to the union-security clause for new employees and the payment of medical insurance benefits. In early November, Olson also learned that the employees had not received a 10-cent-an-hour wage increase retroactive to May 1.

Olson reported the employees' complaints about overtime pay to Union Agents Mohr and Bronson. They assured her that the problem had been grieved and settled. However, they pursued the matter with the Country Club's manager, Russell, who responded to their inquiries by asking, ''Who wanted to know, Sue Olson?'' In an effort to shield Olson, the union representatives suggested that several employees had called them, but Russell persisted in suggesting that Olson was their source.[3]

In early November, Olson asked Russell if she could convert to a full-time steady position. When Russell told her there were no openings, Olson pointed out that Respondent was employing two steady extras rather than one steady as required by the collective-bargaining agreement. Olson subsequently submitted a written request to Russell for a steady post but received no reply.

Shortly after Olson reduced her request to writing, Mohr and Bronson broached the same issue with Russell, stating that they heard he was denying employees steady jobs. Russell immediately named Olson as the probable complainant and then remarked: ''We haven't talked so much on the phone until Sue Olson has returned to this club.'' He further commented that since her return, ''all these problems . . . all of a sudden are arising.''

Olson soon contacted the union representatives again, informing them that some employees had asked her about their status as union members and eligibility for medical benefits, since union dues told had not been deducted from their paychecks. Mohr and Bronson met with the unit employees at the club on November 16 and discussed these matters with them. Just after their group meeting concluded, the union agents met with Russell and club hostess, Laurie Burkure, to convey the employees' concerns.[4] Russell again blamed Olson for agitating the employees. He told the union agents bluntly that ''none of this would have happened'' were it not for Olson's intervention. He further stated that he thought that the Respondent's settlement with Olson meant that on her return to work, she was not to act as shop steward. Echoing Russell, Burkure stated that she, too, thought that the settlement prohibited Olson from serving as shop steward and that ''none of this shit has been happening until Sue Olson came back.'' Burkure added that Olson was misinforming the employees and was not entitled to give them certain types of information.

Bronson defended Olson by advising Russell and Burkure that any employee was free to engage in such discussions with fellow workers. Apparently unassuaged, Russell suggested that the employees ought to turn to their elected steward. The meeting ended after the union agents advised Russell that they needed to audit Respondent's payroll records in order to investigate the questions raised by the employees regarding dues checkoffs.

As agreed, Bronson and Mohr returned to the country club on November 22 to conduct an audit. Advised by Russell that the union auditors were interested in materials reflecting dues checkoffs, Respondent's office manager, Karen Collins, provided the agents with two massive bound volumes containing computer-generated reports dealing with various employee payroll records for the first three-quarters of 1988.[5] Collins testified that after generally explaining the nature of the documents in the registers, she did not remain with them during the 2 to 3 hours they spent examining the records.

Bronson and Mohr testified consistently that because their purpose was to determine whether union dues was being deducted properly, they limited their audit to certain documents titled ''payroll registers'' which contained the employees' names, departments, job classifications, hours worked, gratuities received and deductions, including union dues for each payroll period in 1988. As Bronson explained, they spent several hours cross-checking data contained on the payroll registers against a union-checkoff list which identified the dues paid or owed for each union member. Whenever possible, they also noted employees names which appeared on Respondent's payroll registers but which were not listed on the Union's checkoff list.

Several weeks later, on December 13, Mohr wrote to Russell that based on its audit, the Union had determined that the Respondent had violated the collective-bargaining agreement by failing to pay dues or initiation fees for enumerated employees. In addition, the letter stated that as a result of the Union's meeting with employees on November 16, other contract violations were uncovered regarding the club's failure to supply the employees with an account of their earnings for special functions and its refusal to offer steady positions to steady extra servers rather than hire from the outside.

On or about December 17, Olson and several other waitresses were discussing whether they had received the correct amount of tips for serving at a large club function. After Olson suggested that they examine a gratuities record kept in the club's business office, the employees approached Office Manager Collins and asked her to review the bar bill for the function in question. Although Collins complied with their request, she voiced irritation with Olson, stating she was tired of Olson accusing her of cheating employees and telling

[3] The grievance regarding overtime payments had been settled, but Respondent's counsel inadvertently forgot to advise Russell about it.

[4] Undisputed evidence shows that Burkure scheduled employees for work, directly supervised the waiting staff, issued disciplinary warnings, sent employees home when work was slack, effectively recommended their hiring and firing, and on occasion, directly discharged employees. Together with Russell, she also met with the union agents as a representative of management. On this record, I find that Burkure was a supervisor within the meaning of Sec. 2(11) of the Act.

[5] For example, the registers contained reports of monthly and quarterly taxes, check reconciliation statements, gross payroll accounts, wage details, and quarterly earnings.

them they were being deprived of insurance benefits. At this point, Burkure joined the group and warned Olson: ''If you're off the schedule next week . . . it's not my . . . doing.''

Shortly after this incident, Club Manager Russell telephoned Mohr and in effect, complained that Olson had no right to inspect the gratuities book or to dispute the tips paid to other servers. He again reminded Mohr that Olson was reinstated on condition that she not act as shop steward. Mohr countered that any employee had a right to verify his or her tips.

Olson's troubled relations with management flared up on still another occasion in mid-December. She and several other coworkers were instructed to remain after hours to prepare table settings for the next day. One of the employees, Linda Wallis, testified that she asked Olson whether they were required to do this work under the union contract. Olson answered she understood that servers were not required to perform such duties. Wallis then repeated Olson's answer to Burkure. At this, according to Wallis' and Olson's uncontroverted testimony, Burkure told Wallis, ''Don't listen to Susan Olson. She's in enough shit with the Labor Board and going through her Union charges.''

On December 19, Olson attended an employee Christmas party at the club sponsored by the Respondent. A private party followed at the home of one of the employees. Olson testified in the instant proceeding that during the course of the evening, she spoke with the club's golf course superintendent, Ken DeBusscher, telling him about her discharge and subsequent reinstatement 6 months later with no backpay. Olson also testified that during the private party, she commented to Assistant Office Manager Debbie Burkholder that her superior, Karen Collins, had changed since she became office manager.

After the Christmas holiday, Olson telephoned Burkure asking for her next week's work assignment. Burkure answered that Russell had instructed her not to schedule Olson for work, although she was unaware of the reason for his decision. Olson called several more times and finally, Burkure told her that Russell had simply referred to the club's workrule 14 which provided that an employee was subject to immediate discharge for ''making or publishing false, vicious, or malicious statements concerning any employee, supervisor, the company or its food, beverages or services.''

The Union promptly filed a grievance protesting Respondent's adverse action against Olson. Shortly thereafter, in early January, Union Agent Bronson asked Respondent's counsel why Olson had been discharged. Bennett replied, ''It's the same stuff . . . Sue's out at the club running her mouth, giving advice. Same old Sue with the big mouth . . . . She went to a party and she ran her mouth to the employees about her arbitration, her Board charge and also about Wayne Russell.'' Bennett then suggested that if Bronson could promise that Olson would keep her mouth shut, he ''could probably get her put back on the schedule'' although he would have to consult with the manager first.

3. The arbitrator's opinion and award

An arbitration hearing was held on Olson's grievance on March 24 and April 3, 1989. In a decision dated April 11, the issue as initially framed by the arbitrator was, in substance, whether Respondent denied Olson further work for engaging in union activities as Local 24 claimed, or for violating a workrule prohibiting false, vicious, or malicious statements by making certain remarks at Christmas parties, as the Respondent contended. The arbitrator denied the grievance, concluding that several grounds justified Respondent's decision to reject Olson for further work.[6]

Before reaching this conclusion, the arbitrator summarized the evidence presented by the opposing parties. He turned first to Golf Superintendent DeBusscher who testified to a conversation with Olson at the club's Christmas party. According to DeBusscher, Olson raised the subject of her discharge and reinstatement, admitted to him that she felt bitter and resentful about her treatment, and adding that, now that she was back, she would ''make it rough on them.'' DeBusscher further related that Olson called the club manager an ''asshole'' who ''did not give a shit about anyone at the club.'' According to the arbitrator's description, DeBusscher opined that Olson's conversation with him was ''filled with malicious comments and bad language.'' He testified that he reported her remarks to the club manager that same evening, and at Russell's request, prepared a written statement the following day. (R. Exh. 1 at 5–7.)

Assistant Office Manager Burkholder also was called as a witness by the Respondent at the arbitration hearing. According to Arbitrator Brown's summary, Burkholder stated that during the private Christmas party, Olson commented that Office Manager Collins was ''in cahoots'' with management and suggested that if Burkholder wanted to move into a higher positions, she would have to engage in oral sex with the manager.[7]

The arbitrator also noted that Burkholder had heard employees call the manager vile names before without suffering any adverse consequences. However, he reported that Burkholder indicated the name-calling was said in passing and to her knowledge management had not heard about the use of such profanity.

In recounting Russell's testimony, the arbitrator stated that the club manager agreed to Olson's resignation as steward as a condition of the settlement because ''she was overzealous'' and ''not able to sort out the employees' unfounded complaints and concentrate on their legitimate grievances.'' He also believed that she gave the employees ''bad advice, spread rumors and created bad will in the unit.'' (R. Exh. 1 at 11.)

In addition, Russell testified that he learned of Olson's malicious statements about him on December 20 and determined, without getting Olson's side of the story, that she had engaged in such conduct ''to demean his reputation and to destroy his image in the eyes of the employees under his direction.'' He acknowledged asking other employees who had attended the Christmas parties for statements, but they had either heard nothing relevant or ''less damaging'' remarks. Lastly, he conceded that this was the first time he had invoked workrule 14, but only because he had no occasion to do so heretofore.

[6] No transcript of the arbitration proceeding was offered into evidence in the instant trial. Further, although the parties agreed that the arbitrator's summary was not inaccurate as far as it went, they also agreed that it was not a verbatim recordation of the witnesses' testimony.

[7] According to the summary of Burkholder's testimony, Olson used more sexually explicit language than indicated here.

In reviewing Olson's testimony, the arbitrator first focused on the terms of her settlement, including her resignation as steward. He then noted that notwithstanding her resignation, Olson continued to advise her fellow employees and pursued grievances about management policies after her return to work. Thus, apparently referring to the incident in which employees' questioned their tips, the arbitrator pointed out that shortly before the Christmas party, Olson had been involved in a dispute which led to a confrontation with the office manager. He also referred to Olson's role in contacting the Union about the club's failure to pay union dues which led to an audit of the club's records and payment of additional initiation and insurance fees.

Olson acknowledged at the arbitration proceeding that she had talked with the golf superintendent, but only at the private Christmas party. She recalled telling him, as well as other employees who asked, about her settlement and remarked that her return to work without backpay was not a victory. She also recalled that all the employees were complaining about their small Christmas bonuses; that others were ''cutting down'' the club manager, and that when she was urged by her fellow workers to give an opinion of Russell, she said, ''He is a son of a bitch who screws us out of nickels and dimes while he makes thousands.'' (R. Exh. 1 at 17.)

The arbitrator also referred to testimony offered by Union Business Agent Bronson, who confirmed that Olson called her regularly about union matters after her reinstatement and that her complaints had led to an audit of the club's records.

Based on the record as described above, the arbitrator found just cause for Olson's removal as a steady extra. In so finding, he brushed aside claims that the Respondent's true motivation was to retaliate against Olson for her union activities, stating without analysis and in conclusory terms, ''[t]he grievant did not prove these charges.'' (R. Exh. 1 at 38.) He concluded that:

> She was on final warning and yet she went beyond all reasonable limits, even though off duty, with the vicious and malicious remarks she had made about members of management at the club. In light of these remarks the grievant could not be expected to ever work effectively again at the club. She apparently would continue to function as the union steward even though she had promised to resign that position. She would also continue to be bitter and to spread her rancor at the club. For all of these reasons the club has shown just cause for its rejection of the grievant for further work as a steady extra employee. (R. Exh. 1 at 39.)

IV. DISCUSSION AND CONCLUDING FINDINGS

A. *Deferral is not Warranted*

1. The *Spielberg-Olin* standards

The Respondent contends, by way of an affirmative defense, that under Board precedent, the arbitral award in Olson's case is entitled to deference. I disagree.

Pursuant to the mandate expressed in Section 203(d) of the Act, the Board has long regarded arbitration as an effective forum for the peaceful resolution of labor disputes. At the same time, Section 10(a) of the Act provides in pertinent part that the Board's power to prevent unfair labor practices ''shall not be affected by any other means of adjustment . . . that has been established . . . by agreement, law or otherwise.'' While the Supreme Court encourages adherence to arbitration, it has admonished the Board that it may not abdicate its statutory responsibilities in favor of awards which are inconsistent with the purposes of the Act. See *Carey v. Westinghouse Electric Corp*., 375 U.S. 261, 271 (1964).

In resolving the tension between Sections 10(a) and 203(d), the Board held in its seminal decision, *Spielberg Mfg. Co*., 112 NLRB 1080 (1955), that it will defer to an arbitral award where the arbitration proceedings appeared to be fair and regular, all parties to the arbitration had agreed to be bound, the arbitrator's decision was not clearly repugnant to the purposes and policies of the Act and the arbitrator considered the unfair labor practice issue.

More recently, in *Olin Corp*., 268 NLRB 573 (1984), the Board explained that the arbitrator has adequately considered the unfair labor practice issue if this issue is factually parallel to the contract issue, the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice; and the award is not ''palpably wrong,'' that is, the decision is ''susceptible to an interpretation consistent with the Act.''

Although the Board stated in *Olin*, supra at 574, that it would ''not require an arbitrator's award to be totally consistent with Board precedent'' it subsequently ruled that it would not defer where the arbitrator's decision was totally inconsistent with case law. See *Sherwood Diversified Services*, 288 NLRB 341 (1988) (arbitrator's opinion that union waived right to financial data held repugnant to Act where Board found no clear and unmistakeable waiver).

2. The award is repugnant to the Act

In substantial concurrence with the positions of the General Counsel and Charging Party, I agree that Arbitrator Brown's award is not entitled to deference because one of the grounds on which it rests is palpably wrong. Arbitrator Brown specifically ruled that Respondent's rejection of Olson for further work was justified in part by her continuing ''to function as the union steward even though she had promised to resign that position.'' By this, the arbitrator could only be referring to Olson's continuing to discuss working conditions with her fellow employees and reporting possible breaches of the collective-bargaining agreement to the Union after she was reinstated.

In concluding that Olson continued to function as a steward, the arbitrator evidently assumed, as did the Respondent, that when Olson agreed to resign from that position as a condition of her settlement, she also waived any entitlement to engage in protected concerted activity. Consequently, he apparently reasoned (sub silentio) that by persistently engaging in such activities after her reinstatement, she breached a term of her settlement and thereby provided the Respondent with just cause to dismiss her.

Olson simply resigned as steward. Contrary to the arbitrator's assumption, this did not mean that she also forfeited a fundamental right guaranteed to all employees under the Act to engage in ''concerted activities for the purpose of collective bargaining or other mutual aid or protection.''[8] Thus, the arbitrator's conclusion that the Respondent was justified in

[8] 29 U.S.C. § 157.

discharging Olson in part for having exercsed her Section 7 rights is palpably wrong.

Deferral to arbitration is a legally sound and efficient way to resolve labor disputes as long as the *Spielberg-Olin* standards are observed. However, where, as here, the arbitrator relies on a ground that is repugnant to the Act, deferral is not appropriate.

Immediately after ruling that Olson was continuing to function as a steward, the arbitrator then concluded that Olson was justly discharged because she continued ''to be bitter and to spread her rancor at the club.'' (R. Exh. 1 at 39.) In characterizing her conduct in this manner, he did not state which of Olson's acts he had in mind. If the arbitrator was referring to Olson's complaints to the greens superintendent about the terms of her reinstatement, or the size of her bonus, to her request for a steady position, or to her contretemps with the office manager over the size of tips, then he would again be in error for faulting conduct which clearly came within the orbit of protected, concerted activity. However, since the focus of the arbitrator's remarks is unclear, I hesitate to draw conclusions about them.

3. The 8(a)(3) and (d) allegations are intertwined

In order to protect the integrity of rights guaranteed to employees solely under the statute, the Board holds that it will not defer to arbitration where alleged violations of Section 8(a)(4) are involved. *Filmation Associates*, 227 NLRB 1721 (1977).[9] For similar reasons, the Board declines to defer to arbitration where the alleged violations of Section 8(a)(3) and (4) are closely intertwined. *Grand Rapids Die Casting Corp*., 279 NLRB 662 (1986), enfd. 831 F.2d 605 (6th Cir. 1987); *International Harvester Co*., 271 NLRB 647 (1984).

Paragraph 17 of the complaint in the instant case alleges, inter alia, that the Respondent violated Section 8(a)(3) and (4) of the Act by discharging Olson both because she engaged in union activities and previously filed a charge with the Board. Clearly, these allegations are closely intertwined. Consequently, Arbitrator Brown's opinion could not and, in fact, did not address the effect that Olson's unfair labor practice charge had on Respondent's decision to discharge her.[10] For the foregoing reasons, I respectfully decline to defer to the arbitral award denying Olson's grievance.

4. The arbitrator's reliance on workrule 14 was not improper

The General Counsel also contends that deference is not due because the arbitrator found the Respondent was justified in dismissing Olson under a workrule which employed language identical to that which the Board has found to be per se unlawful in other cases. The precedents cited by counsel to support this contention are inapposite when applied to evidence adduced at the arbitration hearing.

Thus, *American Cast Iron Pipe Co*., 234 NLRB 1126 (1978), one of the cases cited by the General Counsel, posed a different set of facts from those presented to Arbitrator Brown. The complaint in that case alleged that the employer violated Section 8(a)(1) by maintaining workrules which prohibited making or distributing false, vicious, or malicious verbal or written statements, and applying those rules to prohibit distribution of a pamphlet prepared by an employee committee because it contained accusations about the employer's hiring practices, id. at 1129–1130. The administrative law judge's analysis started with ''The Board rule . . . that within the area of concerted activities, false and inaccurate employee statements are protected so long as they are not malicious.'' Expressly finding that the statements in the committee pamphlet were not malicious, the judge correctly found the rules to be per se unlawful for two reasons: first, because they were overly broad, forbidding utterances made in the course of protected concerted activity off working time and off the employer's property, and second, because they punished the merely false, as opposed to the malicious and vicious. Id. at 1131. Accord: *St. Joseph Hospital Corp*., 260 NLRB 691 fn. 2 (1982). See *Sierra Publishing Co. v. NLRB*, 889 F.2d 210 (9th Cir. 1989).

In the arbitration at issue here, several of Respondent's witnesses testified that Olson made remarks both at the club and private Christmas parties which the arbitrator characterized as malicious. He then concluded that these remarks justified Respondent's reliance on workrule 14 to remove Olson from the work schedule.

To the extent that the arbitrator ruled that Olson was disciplined pursuant to a rule which proscribed malicious statements, his opinion and award is consistent with the Board precedents cited above holding that such conduct is unprotected. Consequently, in declining to defer to Arbitrator Brown's award, I rely on the reasons set forth in section I,B, and C of this decision, but not on his finding, based on evidence before him, that Olson could be disciplined pursuant to a workrule which prohibited malicious speech.

V. OLSON'S DISCHARGE VIOLATED SECTION 8(A)(3) AND (4)

Having concluded that deferral is unwarranted, the next issue to be resolved, based solely on evidence presented in the unfair labor practice proceeding, is whether Olson was discharged for engaging in protected, concerted activities and for filing a charge with the Board, as the General Counsel contends, or for violating workrule 14, as the Respondent maintains.

Because the parties assign motives for Olson's discharge which are either lawful or illegitimate, the task of assessing the true reason for Respondent's actions requires analysis under the standards announced in *Wright Line*, 251 NLRB 1083 (1980); enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel bears the initial burden of proving that the employees were engaged in protected concerted activity which was a dominant factor prompting the employer's disciplinary decision. If the General Counsel succeeds in establishing a prima facie case, the burden shifts to the Respondent to prove affirmatively that its adverse action would have been the same even in the absence of the employee's protected conduct.

On applying these standards to the present case, I have not the slightest doubt that the General Counsel has met his burden. The record in this proceeding is replete with uncontroverted evidence that Olson was deeply engaged in

[9] Sec. 8(a)(4) provides that it shall be an unfair labor practice for an employer ''to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.''

[10] The arbitrator seemed to believe that because Olson had withdrawn the charge as part of the settlement, he had no authority to consider whether it contributed to Respondent's motives in dismissing her. Instead, he suggested that her recourse was to seek reinstatement of the charge with the Board.

protected concerted activities after she returned to work. She testified without contradiction that discussions with her coworkers about conditions in the workplace were virtually daily occurrences from the day she returned to work. Frequently, questions raised by other employees prompted her to contact the union business agents who, in turn, brought these matters to management's attention.

Respondent's knowledge of Olson's union activities is not an issue in this case. Without being told, Club Manager Russell identified Olson on more than one occasion as the Union's informant. Moreover, Olson made no attempt to conceal her interest in compelling Respondent to comply with the collective-bargaining agreement. Thus, she approached Russell to request a steady position and contended that the contract required that one steady server be hired instead of two steady extras. She prompted the employees to ask the club hostess to review the tips allocated to the servers and challenged Respondent's right to require servers to set up tables. Olson's efforts were not without cost to the Respondent. As a consequence of her actions, Respondent was called on to checkoff dues for new employees, to comply with an agreement for a retroactive pay raise and overtime pay, and to submit to an audit. It is safe to infer that Olson's union activities did not endear her to the Respondent.

But it is unnecessary to rely on inference for unrefuted testimony establishes that club officials openly expressed antagonism towards Olson's union activism. When Bronson and Mohr asked Russell about a grievance settlement regarding overtime or about hiring steady servers, the manager reacted in an accusatory manner, asking rhetorically whether it was Olson who wanted to know. On November 16, when the union agents met with Russell and Burkure about the dues-checkoff situation, they errupted with similar expressions of animosity toward Olson.[11] They both questioned her right to act as a steward and suggested that she was to blame for raising all the problems which surfaced only after she returned to work. Olson was singled out for reproof even when she was only one of a group holding Respondent to account. Thus, when a number of employees questioned the amount of their tips, Collins berated only Olson for accusing her of cheating. Russell, too, held Olson responsible in the contretemps with Collins, for in a call to Mohr, he asked what right Olson had to question the tips paid to others.

Respondent's hostility toward Olson was not only based on her union activities—uncontradicted evidence indicates that Respondent's agents also resented the fact that she had filed an unfair labor practice charge and did not forgive her for doing so even after she retracted it. On several occasions in 1988 Respondent's counsel asked why Olson had taken such a step and urged Mohr and Bronson to persuade her to withdraw it. In December, not long before Olson was discharged for the second time, Burkure told employee Wallis to ignore advice Olson had given her because she was ''in enough shit with the Labor Board and going through her Union charges.'' Then, in January, when the union agents asked why Olson had been taken off the work schedule, Bennett candidly answered that Olson had been ''running her mouth'' at the Christmas party to employees about her ''arbitration, her Board charge, and about Wayne Russell.'' Based on Burkure's and Bennett's remarks, it is clear that Olson's recourse to the Board contributed in some measure to Respondent's desire to be rid of her.

In addition to the foregoing evidence, there is another damaging statement made by a member of management which indicates that Respondent had decided to terminate Olson prior to the Christmas party. I refer to Olson's undisputed testimony that several days before the party, Burkure forewarned her, ''If you're off the schedule next week, I just want you to know that it's not my fault and it's not my doing.''

Based on the showing here of Respondent's unremitted hostility toward Olson for continuing to engage in protected concerted activities and invoking the Board's processes by filing a charge, I conclude that the General Counsel has more than adequately satisfied the requisites of a prima facie case.

The Respondent Failed to Present a Defense

Testimony pertaining to Bennett's January 1989 telephone conversations with the union agents, Olson's acknowledgement that Respondent told her she was removed from the work schedule for violating rule 14, and Russell's brief statement that workrule 14 was applied for the first time in Olson's case, provide the only evidence in the record before me of Respondent's asserted reason for its disciplinary decision.

Apparently, Respondent decided to rely entirely on its argument that the Arbitrator's award was entitled to deference. Consequently, Respondent chose not to call a single witness on its behalf in the instant trial and thereby failed to provide an evidentiary basis to support Russell's claim that he dismissed Olson for violating workrule 14. Respondent made this tactical decision notwithstanding my advice that if deferral was not conferred, then the arbitral opinion had no effect whatsoever in a de novo unfair labor practice trial.[12]

In the absence of testimony from Respondent's witnesses, the only evidence of Olson's comments at the Christmas prties comes from Olson herself. In this regard, she admitted telling DeBusscher and other employees that she had filed a charge over her previous dismissal, that the terms of her settlement were unsatisfactory, and that her bonus was niggardly. She also acknowledged that when asked, she called Russell ''a son of a bitch'' who cheated the employees out of nickels and dimes. In addition, she told Burkholder that Collins had changed since becoming office manager. I find that these remarks ''fell woefully short of the malicious tone that would have been necessary to justify discharge.'' *Golden Day Schools v. NLRB*, 644 F.2d 834, 841 (9th Cir. 1981). Moreover, I find that by enforcing a rule which failed to dis-

[11] Although, as found above, Burkure clearly served as a supervisor, for unexplained reasons, she also was included in the bargaining unit. However, the record indicates that employees were not misled by that fact and that she was regarded as an arm of management. Accordingly, I find that her statements are ''admissable as evidence of . . . [her] employer's motivation in discharging individuals.'' *Montgomery Ward*, 115 NLRB 645, 647 (1956), enfd. 242 F.2d 497 (2d Cir. 1957), cert. denied 355 U.S. 829 (1957).

[12] The arbitral award was received as an exhibit in this case to establish what the arbitrator decided and whether deferral was warranted. See *John Sexton & Co.*, 213 NLRB 794, 795 (1974). It was not admitted as evidence of what Respondent's witnesses said in that hearing.

Respondent attempted to incorporate testimony from the arbitration hearing into the record in this case through Club Manager Russell. However, Russell merely confirmed that testimony of the General Counsel's witnesses in the unfair labor practice proceeding was consistent with their testimony at the arbitration.

tinguish between merely false utterances and those which were malicious or vicious and which forbid conduct beyond the Club's property and working hours, Respondent coerced and restrained its employees in violation of Section 8(a)(1). *American Cast Iron Pipe Co*., supra at 1131.[13]

In light of the foregoing considerations, I conclude that Respondent has failed to meet its burden under *Wright Line* that it would have terminated Olson even if she had not engaged in protected, concerted activity and filed a charge with the Board. It follows that by removing Olson from the steady extra schedule, Respondent violated Section 8(a)(1), (3), and (4) of the Act.

VI. RESPONDENT VIOLATED SECTION 8(A)(5)

As desribed above, Bronson and Mohr reviewed payroll register records on November 22 to determine whether dues were being checked off for unit members. During the course of their audit, they noted whenever possible, the name of employees that appeared in Respondent's registers but were not listed in the Union's records.

By letter dated February 1, 1989, counsel for the Union wrote to Respondent's attorney requesting the following information to assess the club's compliance with articles 3, 4, 7, and 13 of the collective-bargaining agreement:

> The name and hire date of each person who has worked or works as a server during the period March 1, 1988 to date and, for each person, the dates of his or her employment as a steady, steady-extra or extra server and a specification of the dates and hours worked by each in each work week during the March 1 to date period.

At the end of February, having received no reply to this letter, Local 24 counsel, Russell Linden, telephoned an attorney for the Respondent, Patricia Nemeth, who assured him that the information would be forthcoming shortly. However, when the promised material did not arrive, Linden sent another copy of the February 1 letter to Karl Bennett.

The Respondent denies that it has withheld information contending (1) that since the same information was provided to the union agents during their November 22 audit, it has no duty to supply the same information again, and (2) the information is not relevant to any contractual dispute since no grievances or complaints were pending. The Respondent's arguments are unpersuasive.

Well-established law requires an employer to supply the exclusive bargaining agent with requested relevant information which is reasonably necessary to the Union's performance of its duties, including its efforts to administer the collective-bargaining agreement. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956); *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). Taking a broad view of relevance, neither the Board nor the Courts insist that the information sought must be necessarily tied to an existing controversy. *NLRB v. Whittin Machine Works*, 217 F.2d 593, 595 (4th Cir. 1954), cert. denied 349 U.S. 905 (1955). Accordingly, the Respondent's argument that the materials sought were unrelated to a grievance or complaint and therefore, irrelevant, is lacking in merit.

In the present case, the Union asked for the name, dates of hire, job classifications and hours worked by servers in various categories and cited certain provisions of the collective-bargaining agreement which address those matters. At the bottom of the Union's inquiry was a desire to investigate employee complaints that union dues was not being checked off by the Respondent in accordance with the contract. A second motive was to obtain information relevant to Olson's complaint that the Respondent was employing steady extra rather than steady servers. Such an investigation is plainly tied to the Union's duty to police Respondent's possible noncompliance with the collective-bargaining agreement and, therefore, is presumptively relevant. *Stephen Oderwald, Inc*., 288 NLRB 277, 279 (1988).

The Respondent contends that since all the material requested in the February letter was furnished to Mohr and Bronson during their November 22 audit, the Union has no right to reexamine its records. The facts do not support Respondent's contention.

The union agents do not deny that the Respondent's office manager provided them with bound volumes containing voluminous reports during their November 22 visit. However, they testified credibly that the only documents which they examined on that occasion were the payroll registers to determine whether the Respondent was deducting dues for current union members. Since Collins did not remain with them during their audit, she was in no position to contradict their testimony in this regard. Moreover, their task required them to sort through weekly payroll data covering a 6-month period. It is easy to understand that they did not take additional time to examine a separate question; that is, whether dues were being paid for many new employees.

The Respondent further asserts that its willingness to cooperate with the Union's audit on November 22 demonstrates that its records were always available to the Union; that it had no intent to withhold information in bad faith. However, Respondent's counsel made these assertions in a somewhat casual manner; at no time did Respondent officially answer the Union's letters of December 13, February 1, and May 30 and promise to supply the data requested on a date certain.[14] By failing to provide the requested information in a timely manner, Respondent has violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the Union has been the exclusive bargaining representative of employees in a unit described below, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

[13] Pars. 13 and 21 of the complaint alleges that the Respondent unlawfully promulgated and maintained rule 14. Since Russell testified without controversion that the rule first was published in 1982 and was maintained in effect with out protest from the Union, a challenge to the legality of its promulgation is untimely under Sec. 10(b) of the Act. Consequently, although I find that the rule was improperly applied in Olson's case, I do not find that the rule was promulgated unlawfully.

[14] One of Respondent's attorneys did assure the Union's counsel in late February 1989, that the information would be forthcoming. It is not clear whether that commitment led the Union to expect that the Respondent would cull the underlying computer records itself or simply allow the Union to retrieve the information as it did during the November 22 audit. However, questions regarding the manner and form in which the information will be presented can be resolved during the compliance stage of this proceeding.

All employees set forth in schedules ''A'' through ''G'' of the 1987 to 1990 collective bargaining agreement between the Union and the Detroit Club Managers Association.

4. By removing Susan Olson from the work schedule list on or about December 18, 1989, and thereafter refusing to schedule her for work as a steady extra server because she filed a charge with the Board and actively engaged in union activities, Respondent violated Section 8(a)(1), (3), and (4) of the Act.

5. By enforcing a workrule which prohibited employees from making or publishing a false statement about an employee, the club, or its food, beverages or services, without regard to whether such statement was a part of concerted activity, Respondent violated Section 8(a)(1) of the Act.

6. By failing to provide the Union with information requested in its letter of February 1, 1989, Respondent violated Section 8(a)(1) and (5) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(1), (3), (4), and (5) of the Act, I shall recommend that it be required to cease and desist therefrom, and take certain affirmative actions designed to effectuate the purposes of the Act, including posting the notice attached to this decision as an appendix.

Specifically, having concluded that Susan Olson's removal from the work schedule constituted a wrongful discharge, I shall recommend that Respondent be ordered to offer her immediate and full reinstatement to her former position or, if it no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Also, I shall recommend that Respondent be ordered to remove from its records any reference to Olson's unlawful discharge, provide her with written notice of such expungement and advise her that its unlawful conduct will in no way be used for further personnel actions against her.

Further, I shall recommend that the Respondent be directed to provide the Union with the information requested in its letter of February 1, 1989.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Wabeek Country Club, Bloomfield, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Removing from its work schedule or otherwise discriminating against an employee because he or she has filed a charge with the National Labor Relations Board or engaged in protected, concerted activities.

(b) Refusing to bargain with the Hotel Employees and Restaurant Employees International Union, Local 24, AFL–CIO, by failing to provide requested information needed to administer the collective-bargaining agreement.

(c) Enforcing or applying any rule prohibiting its employees when they are on nonworking time and nonwork areas from making or publishing false statements which are related to or a part of concerted, protected or union activities.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Susan Olson immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights or privileges previously enjoyed, and make whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful removal of Susan Olson's name from its steady extra schedule and discharge will not be used against her in any way.

(c) Furnish to the Union in a timely manner the information requested in its letter dated February 1, 1989.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Detroit, Michigan facility copies of the attached notice marked ''Appendix.''[16] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''